

can be appealed to either appellate or cassation courts<sup>888</sup>. Therefore, inconclusive court decision or information about it can be disseminated in specific circumstances when there is a need, for instance, to stop further possible infringing activities or to avoid negative consequences.

Moreover, the court should indicate the form of publishing of the court decision, the length of the publication, place considering the interests of the parties to the case and the principle of proportionality. Following the corresponding court practice of other countries such as Germany or Austria, it is observed that the requesting party also requires to present evidence that publication of the judicial decision is based on the reasonable interest which is the question of fact and is to be estimated by the court. Although it is argued that publicity measures need to be acceptable for both parties by considering the interests of both of them<sup>889</sup>, the main aim of it is to inform the public about the infringing activities and to prevent against further infringements of IP rights. It is assumed that such measure can have a deterrent effect, especially in the Baltic societies where the awareness of IP rights and their protection has to be strengthened<sup>890</sup>.

## V. Concluding remarks

It can be observed that the Baltic countries implemented the mandatory provisions on damages, legal costs, corrective measures as well as publication measures as set out in the Enforcement Directive. The optional solutions such as alternative measures (Article 12 of the Directive) have been also transposed in the Lithuanian Copyright Law, which is not the case for Latvia and Estonia. The main observations regarding the listed implementing provisions are provided as follows.

First, while examining the implementing provisions on damages and, especially, the court practice on the subject-matter, it is observed that the practice on adjudicating actual damages, also loss of profits or infringer's gained profits is very modest in the Baltic countries. It can be observed (on the limited basis, though) that in Latvia and Estonia actual damages, including loss of profit calculated on the basis of royalty fees, has been applied. Differently, in Lithuania the court practice before the im-

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888 For instance, a term to submit an appeal to the district courts or the Court of Appeals is 14 calendar days, and to submit a cassation appeal to the Supreme Court is 30 calendar days in Lithuania. See also the court system (first instance, appellate instance and cassation instance courts) of the Baltic countries in supra § 3C.IV.1.a).

889 See in *Mizaras*, *Novelties on Regulation of Intellectual Property Rights Protection: Material Remedies without Compensatory Effect*, p. 73.

890 On this point Decision of 29 January 2003, Lithuanian Supreme Court, Civil Case No. 3K-3-132/2003, *Microsoft Corp., Symantec Corp., Autodesk, Inc., BĮ UAB "VTeX" vs. UAB "Fima"* should be mentioned. Awareness about IP infringements in the locally well-known company "Fima" and successful case against them made an input for formation of so-called "IP mentality and thinking" which still developing in Lithuania, as previously discussed in supra § 4A.II.

plementation of the Directive and afterwards is more focused on compensation instead of damage as alternative damage calculation method.

Considering operative, preventive and punishing nature of the compensation instead of damages, it can be concluded that a possibility of claiming such compensation was an effective mean to combat a still high-rated piracy in the Baltic region (taking into consideration that compensation has been applied in Lithuanian practice since 1994). Moreover, compensation, which is relatively easier to assess and substantiate, seems a favourable enforcement tool to IP right holders in view of civil proceedings, their length and cost. In turn, its input regarding simplification of the substantiation process in civil IP litigation for the local judges can be also noticeable. License analogy, as alternative and newly implemented method to compensate damages, has not been applied in the national court practice in Lithuania yet (the same applies for Latvia and Estonia). Actual application of license analogy can arguably confirm if it really serves its aims in the future. It is presumed, however, that at least in Lithuania IP right holders will keep on requesting compensation instead of damages due to the established court practice on the issue.

*Second*, it can be also observed that the national courts adjudicate non-pecuniary damage for infringements of moral rights of authors and performers which does not directly fall under the scope of the Directive. It should be stressed, though, that adjudication of such damage in cases of infringements of personal moral rights of authors and performers cannot be held as subsidiary remedy, *i.e.* each infringement of those rights should be the basis to adjudicate non-pecuniary damage as long as all civil legal liability conditions are proved. The amount of such damage is to be established according to the criteria assessed by the court in each individual case.

*Third*, although the national provisions on legal costs, which have been already embodied prior to the adoption of the Directive, are in full compliance with the harmonizing provisions on the legislative basis, a difference between legal costs which are to be reimbursed by the losing party under the court decision and actual legal costs paid by the winning party can be sizeable. In turn, a party – IP right holders – who intend to litigate in the court regarding the infringement of IP rights in question should closely assess litigation costs to the fullest extent possible before starting any legal action.

*Furthermore*, the national court practice on corrective measures shows an actual implementation of the harmonized provisions on the issue and its practical application, whereas the practice on alternative measures, which have been opted by Lithuania only, is still to come. Considering a number of cases regarding unintentional or negligent infringements of IP rights, the more extensive application of alternative measures is deemed to be justified. The same can be applied to the institute of publication measures. More extensive application of this very enforcement tool can sustain its preventive character and role that are significant to enforcement of IP rights in the Baltic region.

## G. *Other national IP enforcement measures which do not fall under the scope of the Directive*

### I. *Other sanctions for IP infringements in view of Article 16 of the Directive*

Although the scope of the Enforcement Directive covers civil enforcement measures, procedures and remedies, criminal measures, being an important tool in enforcement of IP rights, have been already debated while drafting the Directive<sup>891</sup>. It was decided not to include them under the scope of the Enforcement Directive; however, more extensive debates on the issue were moved onto another level, *i.e.* drafting a directive on criminal IP enforcement measures<sup>892</sup>. Thus, as far as IP rights are concerned, the consideration of the existing criminal, also administrative sanctions under the Baltic legislation, which can be currently viewed together with civil IP enforcement measures and which can be affected in case Draft Criminal Enforcement Directive is adopted in the future, are to be briefly reviewed and examined.

1. Administrative and criminal liability and sanctions under the Baltic legislation
  - a) General overview of the national provisions

By virtue of Article 16 and Recital 28 of the Enforcement Directive which refers that without prejudice to civil and administrative measures, procedures and remedies covered by the Directive the Member States may also apply other appropriate sanctions in case of infringements of IP rights<sup>893</sup>, it should be noted that such sanctions, *i.e.* administrative and criminal, are stipulated in the national criminal and (or) administrative legislation of the Baltic countries. Already before the adoption of the Enforcement Directive, administrative and criminal liability against infringements of IP rights and relevant sanctions were embodied in the national legislation of the Baltic countries by virtue of obligations and international standards set out in the Berne Convention, Rome Convention and Paris Convention<sup>894</sup>.

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891 See more about such discussions in *supra* § 5A.I.1.

892 Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights (presented by the Commission): COM (2006) 168 final, April 26, 2006 (hereinafter – the “*Draft Criminal Enforcement Directive*”). Also see *Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive on Criminal Enforcement Measures (2006)*.

893 *Ref.* also to Art. 61 of the TRIPS Agreement which embodies provisions regarding criminal procedures related to infringements of IP rights.

894 See overview regarding Baltic countries’ accession to the listed international treaties in *supra* § 3B.III.2.